

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7270

Joint Petition of Verizon New England Inc., d/b/a)
Verizon Vermont, certain affiliates thereof, and)
FairPoint Communications, Inc. for approval of an asset)
transfer, acquisition of control by merger and associated)
transactions)

Order entered: 1/29/2009

ORDER RE: RAPID RESPONSE PROPOSAL

I. INTRODUCTION

On January 14, 2009, FairPoint Communications, Inc. ("FairPoint") filed a proposal for a Rapid Response Process ("RRP") that would facilitate expeditious resolution of disagreements between FairPoint and competitive local exchange carriers ("CLECs"), particularly those that may arise from the cutover of systems from Verizon New England Inc., d/b/a Verizon Vermont ("Verizon"). The RRP proposal was filed in compliance with the Vermont Public Service Board's ("Board") February 15, 2008, and December 10, 2008, Orders in this Docket. In this Order, we approve the RRP, subject to certain conditions and modifications set out in this Order.

II. BACKGROUND

Paragraph 72 of Attachment 1 to the Certificate of Public Good, and corresponding Paragraph 77 to the Board's Order dated February 15, 2008, required FairPoint to file a proposal with the Board by October 1, 2008, for a "Rapid Response Team" to address potential issues with services provided to wholesale customers arising from the transition from Verizon to FairPoint. FairPoint asked for an extension of time to file this proposal, which the Board granted on December 10, 2008.

FairPoint developed its RRP in response to these requirements. Under the RRP, carriers would first need to engage in the normal dispute resolution processes, including those set out in

the applicable interconnection agreements. If they are unable to reach a resolution, the RRP sets out an expedited process for a determination by the Board, which would only be available if both parties consented to the process. Upon receipt of a petition to use the RRP, the Board would designate a hearing officer to resolve complaints between carriers that could have been brought under 30 V.S.A. § 208. It is intended to address disagreements relating to carriers' obligations under the federal Telecommunications Act of 1996. The appointed hearing officer would have full authority to hear evidence and issue preliminary findings that would be binding on the parties to the dispute. Alternatively, the hearing officer could dismiss the petition or refer it to the Board for resolution.

In determining whether to grant a preliminary finding, the hearing officer would be required to consider the likelihood that the relief requested would be ordered at the conclusion of the proceeding, the benefit to the public or affected customers compared to the harm to the utility or other customers of issuing the order, and the public interest. The hearing officer would also need to consider the costs associated with complying with any preliminary findings that he or she issued and the willingness of the requesting party to reimburse all costs if the final decision is contrary to the Preliminary Finding. A party that consented to use the process would be able to appeal the hearing officer's decision to the full Board (within five days of the preliminary determination).

The RRP also limits the scope of issues. It is not available to address complaints which would result in changes to major legal determinations or policy matters. In addition, the Board may, at any time, determine that a complaint is not appropriate for resolution under the RRP and instead use normal procedures. Moreover, the process as proposed is consensual; either party may decline to use the RRP, in which case the matter would be referred to the Board for resolution in the normal manner.

The Department of Public Service ("Department") and Sovernet Communications ("Sovernet") both support adoption of FairPoint's proposal, modified if necessary to conform to Vermont legal requirements. The Department asserts that it believes the RRP "will be a helpful tool in the resolution of carrier-to-carrier disputes that do not involve major changes in policy." In fact, the Department urges that we make it available for resolution of disputes that do not

involve FairPoint and asks that we notify all carriers of such availability. Sovernet asserts that the process will enable "timely and efficient" resolution of disputes and will facilitate companies raising disputes by reducing the time and cost of resolution.

One Communications ("One Com") commented to FairPoint during the development of the RRP, although it did not submit comments directly to the Board. One Com supported the proposal, which it observed was similar to a process that has worked successfully in Maine, but asked that we include a penalty provision similar to Maine's. This would make carriers subject to penalties for failure to comply with the hearing officer's preliminary findings.

SegTel, Inc. ("segTel") also supports adoption of a proposal which it states is similar to FairPoint's. SegTel asks that we put the RRP in place on a permanent basis and not just for transition issues. However, segTel asks that we modify the process so that the hearing officer's authority is no greater than currently exists under law, *i.e.* the hearing officer could only issue a binding decision on matters with less than \$2,000 in interest.¹ SegTel also asks that we allow 30 days for the filing of an appeal, not 5 as under FairPoint's proposal.

In reply comments, FairPoint contends that, to the extent its proposal may be inconsistent with the statutory processes, parties may waive their objections and consent thereto (citing *In Re Burlington Electric Dept.*, 141 Vt. 540 (1982)). FairPoint also recommends against the proposed addition of a penalty provision as advocated by One Com, arguing that the Board could modify the process to require that a party that consents to using the RRP for a particular complaint would also need to consent to be subject to the penalties under Section 30 of Title 30.

III. DISCUSSION

Overall, we find FairPoint's proposal to be a reasonable approach to allowing more rapid resolution of complaints between carriers, both those that may arise during the transition of services from Verizon to FairPoint and other carrier-to-carrier disputes. Since the telecommunications network has been open to competition (beginning in 1995 in Vermont for local exchange service), the Board has seen few disputes. Based upon our knowledge of the

¹See 30 V.S.A. § 8.

industry, it appears that this is not the result of the absence of issues. Rather, carriers must weigh both the expense of litigation and the time. While this has encouraged informal resolution between the parties, it also has meant that issues that could benefit from a streamlined resolution process are not raised.

FairPoint's RRP sets out a useful mechanism for addressing these concerns. As described above, the RRP would allow for expedited review by a hearing officer rather than the full Board. Moreover, unless the hearing officer's decision was challenged by one of the parties, it would be final. In most instances, this will enable the process to be completed quickly and with significantly less cost than a fully-litigated case before the Board.

The parties' comments raise two concerns, both of which relate to the legal basis for the RRP. Under Vermont law, the authority of a hearing officer is limited. As segTel argues, under 30 V.S.A § 8, a hearing officer may only issue a final decision in consumer complaints with a value of less than \$2,000. As the types of disputes that are likely to arise between carriers are not consumer complaints and will almost always have a value greater than \$2,000, the hearing officer would normally have no authority to issue the kind of determination that the RRP calls for. FairPoint suggests that the parties could, through their consent to participate in the RRP, waive the otherwise applicable procedural rights. We agree that such a waiver by the parties may be appropriate, but it is not clear that such a waiver could be used to grant hearing officers' powers that do not exist under the statute.

The imposition of penalties under 30 V.S.A. § 30 is also uncertain. Under FairPoint's RRP, the hearing officer's determination, although binding on the parties, does not appear to constitute a Board order that would be subject to penalties under Section 30. Even if we accept FairPoint's assertion that the parties can waive procedural rights, the fact that a hearing officer's decision still is not a Board order may not be curable. Thus, we are not persuaded that FairPoint's proposed modification to the RRP, that would require that any waiver and consent encompass acceptance of the imposition of penalties for violating the hearing officer's determination, is acceptable, and therefore we conclude that it should not be incorporated into the RRP.

We can, however, revise the RRP so that it would retain the expedited consideration by the hearing officer, while remaining fully consistent with Vermont law. To achieve this result, the hearing officer's decision would not be final and binding on the parties. Instead, it would constitute a recommendation to the Board, essentially a Proposal for Decision. The parties would still have 5 business days to comment on the recommendation and request oral argument, at which point the Board would act. The procedure before the hearing officer would remain unchanged, as would the hearing officer's ability to dismiss the matter as inappropriate for consideration through the process (thereby leaving the parties free to file the matter for Board resolution through formal proceedings). The addition of the Board review will add approximately a week to the process (perhaps more if oral argument is requested), but otherwise should allow for the rapid review of issues that parties are seeking.

We, therefore, approve FairPoint's RRP, subject to the modifications set out in this Order.

SO ORDERED.

Dated at Montpelier, Vermont, this 29th day of January, 2009.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: January 29, 2009

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.